1MALAYSIA DEVELOPMENT BHD & ORS v. DATUK SERI HJ NAJIB TUN HJ ABDUL RAZAK & ORS

HIGH COURT MALAYA, KUALA LUMPUR
ATAN MUSTAFFA J
[CIVIL SUIT NO: WA-22NCC-212-05-2021]
11 APRIL 2023

Abstract – *Section 30 of the Prison Act 1995, read together with O. 38 r. 31 and Forms 67 and 68 of the Rules of Court 2012, provides that a prisoner's presence in court is only required for the purpose of producing him as a witness; his presence is not merely to afford him with the opportunity to attend court as a party to observe the proceedings or to instruct his solicitor.*

CIVIL PROCEDURE: *Judgments and orders – Order for Commissioner General of Prisons to produce applicant before court for hearing of interlocutory applications – Application for – Applicant serving in prison – Circumstances where presence of prisoner is required in court having civil jurisdiction – Whether applicant's presence required – Whether applicant to be produced as witness – Rules of Court 2012, O. 38 r. 31, Forms 67 & 68 – Prison Act 1995, s. 30*

The first and fifth plaintiffs ('plaintiffs') had filed an application for a *Mareva* injunction against the first defendant to prevent him from disposing of assets worth up to USD681 million, in Malaysia and abroad, pending the disposal of the plaintiff's action ('encl. 92'). The court granted an *ex parte Mareva* injunction on the terms of encl. 92 save for the amount the first defendant was allowed to draw per month. The first defendant applied to set aside the *ex parte Mareva* injunction ('encl. 114') and the court granted an *ad interim* order mainly on the terms of the *ex parte Mareva* injunction until the final disposal of encl. 92. The court then fixed the *inter partes* hearing where encls. 92 and 114 would be heard together. The first defendant had begun serving a 12-year prison sentence for charges related to funds belonging to SRC International Sdn Bhd. In the present application, the first defendant, through his counsel, applied for an order for the Commissioner General of Prisons to produce the first defendant before the court for the hearing of encls. 92 and 114. In support of the application, the first defendant submitted that, *inter alia*, his presence in court was necessary as he was a party to the proceedings and had a right (i) to be present to understand the course of litigation that concerned his property rights; and (ii) to be produced in court even just to observe proceedings and to provide the necessary instructions as the proceedings go by.

Held (dismissing application):

(1) The purpose of producing a prisoner for a hearing in court must be for the purpose of producing him as a witness; not merely to afford him with the opportunity to attend court as a party to observe the proceedings or to instruct his solicitor. Here, encls. 92 and 114 were to be heard as interlocutory matters which did not require any involvement of the first defendant. Reasons such as providing instructions to counsel during the proceedings were not relevant for the court's consideration in this application. (para 29)

(2) Section 30 of the Prison Act 1995 discloses nothing about the circumstances where the presence of a prisoner is required in a court having civil jurisdiction but merely states that when the presence is required, an order in the prescribed form must be addressed to the officer in charge requiring for the production of that prisoner at the time and place to be named in the order. However, under s. 30 of the Act, read together with O. 38 r. 31 and Forms 67 and 68 of the Rules of Court 2012 ('ROC'), a prisoner's presence in court is required only for the purpose of giving evidence and for no other reasons. It had not been shown that the requirements under O. 38 r. 21 of the ROC were satisfied. The attendance of the first defendant in court for the hearing of encls. 92 and 114 as a witness was not required. (paras 34 & 39)

Obiter:

(1) Once a person is convicted and sentenced to prison, he loses some of his basic rights as a citizen. This includes the right to freedom of movement and the right to attend court proceedings as a witness or for other matters. The temporary release of a prisoner is governed by strict rules and is only granted under certain circumstances. Apart from the risk of escape attempts and the commission of further crimes by the temporarily released prisoner, which may not be applicable to the first defendant, the basis of curtailment of a prisoner's rights is found in the punishment and accountability aspect of the justice system. This aspect of the justice system could not be undermined by the release of a prisoner for unimportant reasons. The justice system emphasises the importance of holding criminals accountable for their actions and ensuring that they serve their sentence as intended. (para 38)

Legislation referred to:
Prison Act 1995, ss. 30, 31
Rules of Court 2012, O. 38 rr. 21(1), (3), 23(3), 31

For the plaintiffs - Dhanyaa Shreeya & Tommy Lim Ka Hui; M/s Skrine
For the 1st defendant - Muhammad Farhan Shafee & Alaistair Brandah Norman; M/s Shafee & Co

Reported by Najib Tamby

JUDGMENT

Atan Mustaffa J:

[1] This judgment concerns the application of the first defendant, Datuk Seri Hj Najib bin Tun Abdul Razak, in encl. 201 pursuant to O. 38 r. 21 Rules of Court 2012 ("ROC 2012") against the first plaintiff, 1Malaysia Development Berhad and the fifth plaintiff, Global Diversified Investment Company Limited, for an order for the Commissioner General of Prisons to produce the first defendant before this court for the hearing of certain interlocutory applications.

[2] Enclosure 201 was dismissed by the court after hearing the application on 10 November 2022. These are my grounds of judgment.

Background

[3] The action of the plaintiffs in this action against the first defendant, who held the position of the Prime Minister and Minister of Finance of Malaysia, is primarily for breach of duty as a shadow director and public officer in relation to the misappropriation of the plaintiffs' funds. The plaintiffs contend that the first defendant, by virtue of his position and power, exercised control over the plaintiffs' directors and management and directed them to act in a manner detrimental to the plaintiffs' interests. It was further contended that the first defendant abused his power and position to facilitate fraud, unlawful misappropriation, and sham agreements resulting in the unlawful dissipation of the plaintiffs' funds.

[4] The first plaintiff and fifth plaintiff (together, "the plaintiffs") filed an application in encl. 92 for a *Mareva* injunction against the first defendant, principally to prevent him from disposing of assets worth up to US$681,000,000 in Malaysia and abroad pending the disposal of the plaintiffs' action.

[5] On 8 February 2022, this court granted an *ex parte Mareva* injunction on the terms of encl. 92 save for amount the first defendant was allowed to draw per month. The first *inter partes* hearing date was fixed on 21 February 2022.

[6] On 18 February 2022, an application to set aside the *ex parte Mareva* injunction was filed in encl. 114 by the first defendant *via* his solicitors. On 21 February 2022, this honourable court granted an *ad interim* order mainly on the same terms of the *ex parte Mareva* injunction until final disposal of encl. 92.

[7] This court fixed the *inter partes* hearing on 17 August 2022, where encls. 92 and 114 will be heard together. This hearing was adjourned to 11 November 2022 upon the request of the first defendant. On 23 August 2022, the first defendant began serving a 12-year prison sentence for charges related to funds belonging to SRC International Sdn Bhd.

[8] On 9 November 2021, the first defendant through his solicitors, filed encl. 201 to apply for an order for the Commissioner General of Prisons to produce the first defendant before this court for the hearing of encls. 92 and 114.

This Application

[9] The first defendant, in his application in encl. 201, mainly seeks the following orders:

(i) an order against the Commissioner General of Prisons and the officers in charge of the first defendant to produce the first defendant before this court on 11 November 2022 at 2.30 pm, and on any other date and time as may be fixed by this court, for the hearing of encls. 92 and 114 fixed for hearing on 11 November 2022 at 2.30pm before this court; and

(ii) that the officer in charge of the Kajang Prison where the first defendant is currently serving his sentence shall cause the plaintiff to be brought to this court on the date and time set in para. (i) above and shall ensure the safety of the first defendant throughout the period he is outside of the prison.

[10] The first defendant's affidavit in support of encl. 201, affirmed by the first defendant's solicitor, Alaistair Brandah Norman, states that the first defendant's attendance at the physical hearing of encls. 92 and 114 is necessary for as the first defendant is one of the parties in the action and the applications are important in determining the first defendant's rights to his assets following the decision of this court to allow the *Mareva* injunction order *ex parte*. Further it is stated that the presence of the first defendant is reasonable, fit and proper for the first defendant's counsel to obtain immediate instructions during the hearing of the encls. 92 and 114.

[11] This application was made *ex parte*. However, on the same day encl. 201 was filed on 9 November 2023, the plaintiffs through their solicitors, Messrs Skrine, wrote into court stating their objection to the application and the reasons for this objection. They requested that encl. 201 be dismissed or heard *inter partes* with their presence as counsel for the plaintiffs.

[12] On this basis, I directed that encl. 201 be proceeded on an opposed *ex parte* basis on 10 November 2022.

[13] At the hearing, Ms Dhanyaa, plaintiffs' counsel informed the court they were prepared to argue the application without filing an affidavit in reply.

[14] It is stated in encl. 201 that the application was made pursuant to O. 38 r. 21 ROC 2012 and s. 31 of the Prison Act 1995 ("the Prison Act"). Learned counsel for the first defendant, Encik Farhan, conceded that apart

from s. 31 of the Prison Act, s. 30 is also relevant. He made an oral application to amend encl. 201 to include a reference to s. 30 of the Prison Act which was allowed by the court.

The Law

[15] Section 30 of the Prison Act provides that when the presence of a prisoner is required in a court with civil or criminal jurisdiction, the court may issue an order addressed to the officer in charge requiring for the production of that prisoner at the time and place specified in the order. An application to the court for the order to produce the prisoner before the court under s. 30 of the Prison Act is made under O. 38 r. 21 of the ROC 2012. The application for the order may be made *ex parte* by notice of application supported by an affidavit.

[16] Section 30 of the Prison Act is produced below:

> 30 Production before the court
>
> (1) Whenever the presence of a prisoner is required in a court having civil or criminal jurisdiction, the court may issue an order in the prescribed form addressed to the Officer in Charge requiring for the production of that prisoner at the time and place to be named in the order.
>
> (2) Upon receipt of the order, the Officer in Charge shall cause the prisoner named in the order to be brought up as directed and shall provide for his safe custody during his absence from prison.
>
> (3) In the event of an adjournment of the matter in which the presence of the prisoner is required, the court may, by endorsement on the order, require the prisoner to be again brought up at the time and place named in the order.
>
> (4) An order issued from the Federal Court, Court of Appeal or the High Court may be signed by the Registrar of the Court, and if issued by any other court shall be signed by the Sessions Court Judge, Magistrate, Registrar or such other presiding officer, as the case may be.

[17] Order 38 r. 21 is set out as follows:

> 21. Attendance of prisoner as witness or party (O. 38 r. 21)
>
> (1) An application for an order under section 30 of the Prison Act 1995 [Act 537] for the production before the Court of a person confined in prison may be made *ex parte* by notice of application supported by an affidavit in Form 67.
>
> (2) Unless the Court otherwise orders, the costs of conveyance of the witness in safe custody to and from the Court shall be paid in the first instance by the party on whose application the order was issued and shall be costs in the cause.
>
> (3) An order for the production of such person shall be in Form 68.

A **First Defendant's Submissions**

[18] Encik Farhan argued that the presence of the first defendant in court is necessary as he is a party to the proceedings and has a right to be present to understand the course of litigation that concerns his property rights. Learned counsel referred the court to Form 67 of the ROC 2012 which is the relevant form of affidavit in support of such an *ex parte* application to produce the prisoner provided in r. 21(1) which is reproduced below:

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I ... of ... do make oath (or affirm) and say:

1. That the above action is fixed for hearing on ... the ... day of ..., 20 ... and that ... now a prisoner confined in the prison, will be a material witness for me at the hearing (or is a party to the action).

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2. That I am advised and verily believe that I cannot safely proceed to the hearing of his action without the evidence of the said ... (or my evidence).

D

3. I hereby apply for an order under section 30 of the Prisons Act 1995 that the said ... may be brought before the Court.

4. I hereby undertake to pay the costs of conveyance of the said ... in safe custody to and from the Court and of maintenance of him and the officers in charge of him while attending the Court.

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Sworn (or affirmed) as in Form 14.

[19] Encik Farhan said that Form 67 is the form which ultimately becomes the order to produce. I have to state at this point, with respect, that he was mistaken as the form for the order for production is Form 68 as provided in r. 23(3). Form 67 is the form for the affidavit. I will come back to the significance of this in my analysis below.

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[20] Counsel argued that based on para. 1 of Form 67, the form makes provision for production of an individual who is a party to the action, therefore an application made under O. 38 r. 21 is the correct mode to be made together with s. 30 and s. 31 of the Prison Act.

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[21] Encik Farhan submitted that as a party to the action, the first defendant has a right to be produced in court even just to observe proceedings and to provide the necessary instructions as the proceedings go by.

[22] Encik Farhan also argued that although para. 2 talks about the prisoner not being able to proceed safely to the hearing of his action without his evidence, Form 67 can be varied and para. 2 can be omitted for the purpose of drawing up the order to produce.

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[23] Counsel further argued that the rule has been applied in various applications earlier to produce the first defendant in other proceedings before other courts. Counsel pointed out that in an earlier judicial review

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proceeding, the first defendant's attendance was allowed by Justice Ahmad Kamal bin Md Shahid, and the first defendant also attended a number of interlocutory hearings before Justice Ahmad bin Bache for another case.

[24] Learned counsel disputed the plaintiffs' contention that the first defendant's presence is not required under O. 38 r. 21, arguing that the first defendant's status as a party is sufficient reason to require his attendance. In another hearing relating to a *Mareva* injunction by SRC International Sdn Bhd in Civil Suit No: WA-22-NCvC-340-05-2021 against the first defendant, the first defendant did not attend because it was not required as he was not incarcerated yet and he had other opportunities to instruct his solicitors. Counsel was of the view that the plaintiffs have not established that the first defendant's presence is not required.

Plaintiffs' Submissions

[25] Ms Dhanyaa, counsel for the plaintiffs, argued that the first defendant's application for the production of an imprisoned person under O. 38 r. 21 does not comply with the statutory provisions. Counsel contended that there is a requirement to show that the presence of the imprisoned person is required, which the first defendant has not established. Counsel also emphasised that the hearing will be based on affidavit evidence, and the submissions have already been filed, so there is no need to obtain further instructions from the first defendant at this juncture.

[26] Learned counsel acknowledged the first defendant's contention that it has been difficult for the first defendant's solicitors to meet the first defendant and obtain instructions, but argued that this is not a reason for an application to be made under this section. Learned counsel also argued that although O. 38 r. 21 states that it applies to a party and not just a witness, that does not mean that the imprisoned person's attendance is automatically required. Counsel argued that the first defendant has not established a necessity for the first defendant's attendance, and therefore the application should be disallowed.

[27] Ms Dhanyaa also argued that the general heading of O. 38 is "evidence" and therefore, the necessity to produce the first defendant must relate to the evidence that is given at the hearing.

Analysis And findings Of The Court

[28] As a starting point, the court considered what O. 38 of the ROC 2012 relates to. The general heading for O. 38 *ie*, "Evidence: General" makes it clear that the order relates to evidence. Order 38 contains rules as to the means by which particular facts may be proved, and the mode in which evidence thereof may be given, at the trial of an action and, generally, at a trial before a registrar. See Malaysian Civil Procedure 2012 at para. 38/0/2. Specifically, in respect of attendance of a prisoner in court, the commentary in Malaysian Civil Procedure 2012 at para 38/23/5 states:

A Attendance of prisoner – A person confined in prison can be **produced before the court as a witness** under the Prison Act 1995 (Act 537), Section 30 with the leave of the court. The application for an order may be made *ex parte* by notice supported by an affidavit in Form 67. The order for the production of such person shall be in Form 68. The costs of conveyance of the witness in safe custody to and from the court shall be paid by the
B party applying for the issuance of the order and shall be costs in the cause, unless the court otherwise orders. (emphasis added)

[29] It is clear from the commentary that the purpose of producing the prisoner for a hearing in court must be for the purpose of producing him as a witness, not merely to afford him with the opportunity to attend court as
C a party to observe the proceedings or to instruct his solicitor. Here, encls. 92 and 114 are to be heard as interlocutory matters which do not require any involvement of the first defendant. Reasons such as providing instructions to counsel during the proceedings are not relevant for the court's consideration in this application.

D **[30]** I also turn to the forms referred to in O. 38 r. 21 for further guidance on the purpose of the application.

[31] As I have alluded above, Form 67 is the form of affidavit in support for the application for an order under s. 30 of the Prison Act for the
E production before the court of a person confined in prison as provided under O. 38 r. 21(1). This is not the form of the order to produce as argued by Encik Farhan. I note that the affidavit in support (encl. 202) does not follow this format which by itself is a procedural irregularity. I cannot accept Encik Farhan's argument that para. 2 can be omitted when drawing up the order (*sic*). Disregarding for a moment the fundamental error in Encik Farhan's
F arguments, even in the affidavit in support, para. 2 cannot be omitted. The applicant needs to state that the prisoner cannot safely proceed to the hearing of his action without the evidence of the prisoner.

[32] The position becomes even clearer when Form 68 is examined. Order
G 38 r. 21(3) states, "An order for the production of such person shall be in Form 68". Form 68 in its entirety is produced below:

Order To Produce Person In Prison (O. 38 r. 21)
(Title as in action)
To the Officer in charge of the ...

H You are hereby required, upon tender made to you of a reasonable sum for the conveyance and maintenance of a proper officer and of .... now a prisoner in the ... in going to, remaining at and returning from the Court at ..., to bring the said ... on the ... day of ... 20 ... at a.m./p.m. to give testimony on behalf of ... and after the said ... shall have given his

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testimony before the Court or the Court shall have dispensed with his further attendance, you are required to cause him to be conveyed under safe and sure conduct back to the said ...

Dated the ... day of ..., 20.

(Seal)
Registrar

[33] The key words for the purpose of my analysis are "to give testimony on behalf of ... and after the said ... shall have given his testimony before the Court." There is no doubt here that the purpose of the prisoner coming to court pursuant to such an application is to give testimony. I cannot see how this order to produce can be drawn up in any other way without stating that the first defendant is providing testimony for the hearing of encls. 92 and 114 when he is not.

[34] Section 30 of the Prison Act discloses nothing about the circumstances that the presence of a prisoner is required in a court having civil jurisdiction but merely states that when the presence is required, an order in the prescribed form must be addressed to the officer in charge requiring for the production of that prisoner at the time and place to be named in the order. However, under s. 30 of the Prison Act, read together with O. 38 r. 31, Form 67, and Form 68 of the ROC 2012, a prisoner's presence in court is required only for the purpose of giving evidence and for no other reason.

[35] Learned counsel for the first defendant makes mention of other similar applications by the first defendant before other courts which were allowed. The applications were made in Judicial Review No. WA-25-520-10-2022 ("JR 520") and Civil Suit No. WA-21NCVC-193-10-2021 ("Suit 193"). JR 520 concerned the first defendant's judicial review application in respect of the prison department's decision to not grant him permission to attend parliamentary sessions. Suit 193 concerned the first defendant's suit against former Attorney-General Tan Sri Tommy Thomas and the Government of Malaysia over charges brought against him in criminal cases linked to 1Malaysia Development Bhd, the first plaintiff herein.

[36] In the O. 38 r. 21 application made in JR 520, the application was to allow the first defendant to attend the hearing for the judicial review leave application. This was allowed by the court. However, from a perusal of the notes of proceedings in question, there was no objection from the Attorney-General Chambers. In Suit 193, the application was to allow the first defendant to attend the hearing of his striking out application. This was allowed by the court. The notes of proceeding disclosed that the application was heard *ex parte* with only the plaintiff's counsel present.

[37] Therefore, I could only reasonably surmise that the legal position regarding the applications under O. 38 r. 21 were not canvassed before the courts in JR 520 and Suit 193. It is different here as the plaintiffs are opposing encl. 201 and have brought to the attention of the court the correct position of the law which the court accepts. Therefore, the decisions of the courts in JR 520 and Suit 193 have no bearing on encl. 201 herein.

[38] I wish also to observe that once a person is convicted and sentenced to prison, he loses some of his basic rights as a citizen. This includes the right to freedom of movement and the right to attend court proceedings as a witness or for other matters. The temporary release of a prisoner is governed by strict rules and is only granted under certain circumstances. Apart from the risk of escape attempts and the commission of further crimes by the temporarily – released prisoner, which in my fair assessment may not be applicable to the first defendant, the basis of the curtailment of a prisoner's rights is found in the punishment and accountability aspect of the justice system. This aspect of the justice system cannot be undermined by the release of a prisoner for unimportant reasons. The justice system emphasises the importance of holding criminals accountable for their actions and ensuring that they serve their sentence as intended.

Conclusion

[39] In the circumstances, it has not been shown to me that the requirements under O. 38 r. 21 ROC 2012 are satisfied. The attendance of the first defendant in court for the hearing of encls. 92 and 114 as a witness is not required. Enclosure 201 is therefore dismissed.